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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 267

ITHACA TRUST COMPANY, SOLE SURVIVING EXECUTOR and Trustee under the last will and testament of Edwin C. Stewart, deceased, petitioner

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 22) in this case has not yet been officially reported.

JURISDICTION

The judgment sought to be reviewed was entered February 20, 1928. (R. 25.)

A motion for new trial was overruled May 28, 1928. (R. 26.)

Petition for certiorari was filed July 13, 1928. (R. 26.) Jurisdiction of this Court to issue the writ

is found in Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

The testator's residuary estate was given by his will to his wife for life. The will authorized the life tenant to dispose of any part of the realty at a price which, in her judgment, was for the best interest of the estate, and to use any additional sum from the principal of the estate that might be necessary to support her suitably in "as much comfort as she now enjoys" and gave the "balance" of such residuary estate to certain charities. The wife died about six months after the death of the testator, before an estate tax return was made or a tax paid. The question presented is whether the estate is entitled to a deduction under the provisions of Section 403 (a) (3) of the Revenue Act of 1918 on account of the gifts to charities.

THE STATUTE AND REGULATIONS

The portions of Section 403 of the Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1098) which are applicable are as follows:

> That for the purpose of the tax the value of the net estate shall be determined—
>
> (a) In the case of a resident, by deducting from the value of gross estate—
>
> * * * * *
>
> (3) The amount of all bequests, legacies, devises, or gifts, to or for the use of the United States, any State, Territory, any

> political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes. This deduction shall be made in case of the estates of all decedents who have died since December 31, 1917 * * *.

Articles 53 and 56, Regulations 37, approved August 8, 1919, relating to estate taxes under the Revenue Act of 1918, were as follows:

> ART. 53. PUBLIC, CHARITABLE, AND SIMILAR BEQUESTS.—Bequests to religious, charitable, scientific, literary, or educational corporations are deductible only if the corporation is organized or operated exclusively for one of the purposes specified (see Art. 54). Similarly, in the case of a trust, the trust must be exclusively for such purposes. It does not prevent deduction, however, that the property placed in trust is also subject to another trust for a private purpose. Thus, where money or property is placed in trust to pay the income to an individual during life, and then to pay or deliver the same to a charitable corporation, or apply the principal to

a charitable purpose, the charitable bequest or devise forms the basis for a deduction. The amount of the deduction, in such case, is the value, at the date of the decedent's death, of the remainder interest in the money or property which is devised or bequeathed to charity. For the manner of determining the value of such remainder interest, see Article 20. Gifts made in the decedent's lifetime are deductible only if made in contemplation of death, or intended to take effect at or after death, and the property is consequently included in the gross estate. Gifts made in satisfaction of a legacy are also deductible. The deduction is not limited in the case of the estates of residents to bequests to domestic corporations or to trustees for use within the United States.

ART. 56. CONDITIONAL BEQUESTS.—Where the bequest, legacy, devise, or gift is dependent upon the performance of some act, or the happening of some event, in order to become effective it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed. Where, by the terms of the bequest, devise, or gift, it is subject to be defeated by a subsequent act or event, no deduction will be allowed.

Article 20, Regulations 37, above referred to, provides for the valuation of annuities, life and remainder interests, according to mortality tables set up in the regulation.

STATEMENT

Edwin C. Stewart died June 15, 1921. (R. 19.) His will made certain specific bequests (R. 14–15), and then provided (R. 15):

> Twelfth. I give unto my beloved wife, Annie L. Stewart, of Ithaca, New York, the use for her natural life of all the rest, residue, and remainder of my property, real, personal, and mixed, of which I may die seized, with full authority to sell and dispose of any real estate of which I may die seized, for such figures as she may, in her judgment, deem for the best interest of my estate. I also authorize my wife, Annie L. Stewart, to use any additional sum from the principal of my estate that may be necessary to suitably maintain her in as much comfort as she now enjoys. I request my wife, Annie L. Stewart, from the said income of my estate, to give annually a sum sufficient in her judgment for the maintenance of my cousin, Grace L. Ely of West Allenhurst, New Jersey.

The will directed the testator's executor "from the balance of my estate at the death of my wife" to pay certain sums of money to certain institutions and to create a trust of the residue of such balance for another institution. (R. 15–17.) All of such institutions, with the exception of one to which a comparatively small amount of money was to be paid, were of such character that bequests, legacies, devises, or gifts to them or for their use are to be

deducted under Section 403 of the Revenue Act of 1918 from the value of gross estate for the purpose of determining net estate subject to estate tax. (R. 21–22.)

The petitioner and testator's widow qualified as executors. (R. 19.) On December 12, 1921, the widow died, leaving the petitioner the sole surviving executor. (R. 19.)

On June 14, 1922, the petitioner as executor made and filed an estate tax return and paid the estate tax shown to be due. Subsequently the Commissioner of Internal Revenue found an additional estate tax to be due. The petitioner filed a claim for abatement of this additional tax, the greater portion of which was disallowed. Thereupon petitioner paid the additional tax. Petitioner later filed a claim for refund which was rejected by the Commissioner of Internal Revenue, and this suit resulted. (R. 20–21.)

There is no express finding by the Court of Claims that the amount involved in this suit represents additional tax due to the refusal of the Commissioner to permit deduction from the testator's gross estate of the value of the bequests to charities, but this is stated in the opinion of the Court of Claims (R. 22–23) and is a necessary inference from the petition and the facts found.

The value of the entire residuary estate at the date of the testator's death was $347,244.51. (R. 21.) The widow was born on May 27, 1860. (R.

20.) The value of the life estate in $347,244.51 to a person 61 years of age (as shown by mortuary tables) is $126,329.64. (R. 21.)

The Court of Claims found (Finding XIII, R. 21):

> For many years prior to the death of said Edwin C. Stewart, he and his widow, Annie L. Stewart, lived in Ithaca, New York, in a simple and unpretentious style, spending each year less than the income produced by the estate of said testator; and the income from the estate of said testator was, at his death, and during the life of the widow, in excess of the sum necessary to maintain her suitably in as much comfort as she enjoyed at any time during the lifetime of said testator. After the payment of debts and the specific legacies, the estate produced an income in excess of the sum necessary, in the absence of unusual circumstances, to maintain her suitably in as much comfort as she enjoyed at any time during the lifetime of the said testator.

The Court of Claims dismissed the petition, holding that the petitioner was not entitled to any deduction on account of the bequests to charities. (R. 25.)

It is not entirely clear whether the decision of the Court of Claims rests upon the proposition that contingent bequests to charities are never deductible even though their value is provable, or upon the proposition that in this case the value of the be-

quests was not provable. We will discuss these propositions in order. The Court of Claims seems to have assumed that these propositions were to be applied upon the basis of the facts as they existed at the date of the testator's death and that the subsequent death of the life tenant before a tax return was filed or tax paid was immaterial. We will discuss this question as our third point.

ARGUMENT

I

THE VIEW OF THE TREASURY DEPARTMENT, THAT CONTINGENT BEQUESTS TO CHARITY ARE NOT DEDUCTIBLE EVEN THOUGH THEIR VALUE MAY BE ASCERTAINED BY THE USE OF EVIDENCE ORDINARILY ADMISSIBLE, IS OPEN TO SOME QUESTION

The regulations issued by the Treasury Department relating to estate taxes have consistently provided that if a devise or bequest to charity is certain to vest and can not be ultimately defeated its value is deductible, and that experience tables of mortality may be resorted to to ascertain the value, but where the bequests to charity are contingent and it appears that they may never vest or be defeated before the time for enjoyment arrives, the value of the charitable bequest may not be deducted. The regulations above quoted, contained in Regulations No. 37, are found without substantial change in subsequent editions relating to later Revenue Acts. (See Regulations 63, 1922 edition, Articles 47 and 50; Regulations 68, 1924 edition,

Articles 44 and 47; Regulations 70, 1926 edition, Articles 44 and 47.)

In *Mitchell* v. *United States* (63 C. Cls. 613) the Court of Claims apparently adopted the view of the Treasury Department. In its opinion in the present case that court said (R. 24):

> In the case of *Mitchell et al.* v. *United States,* 63 C. Cls. 613, it was held that the revenue act applicable here, authorizing deductions from the gross estate of the amount of all bequests or gifts to a trustee, exclusively for religious or charitable purposes, applied only to bequests or gifts intended to take effect "upon the testator's death or upon the happening of an event that will certainly occur," and that if the contingency upon which the bequest was to go to charitable purposes was such that the bequest might never become effective in possession or enjoyment, there was no authority under the statute for a deduction of the amount, *or its ascertained value,* from the gross estate. (Italics ours.)

On April 9, 1928, this Court affirmed the judgment of the Court of Claims in the *Mitchell case,* under the title of *Humes et al.* v. *United States,* No. 376, October Term, 1927. It is clear, however, that this Court did not decide whether or not the *ascertained value* of a contingent bequest to charity may be deducted; it merely held that in that case there was no way of ascertaining the value of the charitable bequest. This Court said:

> One may guess, or gamble on, or even insure against, any future event. The Solicitor General tells us that Lloyds of London will insure against having twins. But the fundamental question in the case at bar, is not whether this contingent interest can be insured against or its value guessed at, but what construction shall be given to a statute. Did Congress in providing for the determination of the net estate taxable, intend that a deduction should be made for a contingency the actual value of which cannot be determined from any known data? Neither taxpayer, nor revenue officer—even if equipped with all the aid which the actuarial art can supply—could do more than guess at the value of this contingency. It is clear that Congress did not intend that a deduction should be made for a contingent gift of that character.

In our brief in this Court in the *Humes case* we indicated that we thought that there might be some doubt whether the Treasury Department is correct in its view that no deduction may be made for any bequest to charity, the ultimate enjoyment of which is contingent. We said (p. 11):

> • • • In providing by regulation that experience tables of mortality may be used to determine the present value of a bequest to charity in the form of a remainder after the expiration of a life estate the Treasury Department is not far from conceding that where the only contingency on which the be-

> quest to charity depends is the duration of the life of a known individual not only the value of the bequest to charity, but the question whether the charity will ever enjoy the bequest may be determined through the use of mortality tables.

Nothing has occurred which has caused us to doubt the correctness of this statement.

II

IT IS DOUBTFUL WHETHER THE VALUE OF THE CHARITABLE BEQUESTS HERE INVOLVED WAS PROVABLE AT THE DATE OF DEATH OF THE TESTATOR

If the Treasury Department is not correct in its view that no deduction may be made for any bequest to charity the ultimate enjoyment of which is contingent, the question arises whether the value of the bequests here involved was ascertainable. The Court of Claims, evidently regarding the date of the testator's death as the basic date upon which value must be ascertainable in order to permit deduction, said (R. 24–25):

> It is clear that what is given for charitable and religious purposes is the "balance" of the estate at the death of the life tenant, whatever that "balance" might be. The life tenant had not only the use of the personal property, but the right to dispose of the real estate at her discretion and to use as much of the principal as would enable her to live in the comfort described in the will.
>
> Without entering into a discussion of what limitations there were, if any, on ex-

penditure by the life tenant "to suitably maintain her in as much comfort as she now enjoys," it is evident that the failure of investments, the diminution of the income, the high cost of living, and the changing ideas of what constitutes comfort might well absorb a good part, and possibly all, of the principal sum and leave no balance for charity, and that a contingency permeates the gifts to charity which may prevent any of them from ever going into possession and enjoyment. The gifts for charitable and religious purposes, therefore, did not take effect upon the death of the testator or upon the happening of an event which would certainly occur, and consequently, within the meaning of the statute, could not be deducted from the gross estate. In this view of the case, the plaintiff is not entitled to recover.

It seems open to some doubt, upon the authorities, whether the discretion given to the wife in the present case "to use any additional sum from the principal of my estate that may be necessary to suitably maintain her in as much comfort as she now enjoys" was an absolute discretion rendering the value of the remainders to charities incapable of determination, or whether the courts could control the exercise of such discretion, thus rendering the amount which could properly be applied to the wife's use capable of estimation, and the value of the remainders capable of determination.

In *Kahn et al., Executors,* v. *Bowers, Collector,* 9 F. (2d) 1018, the Circuit Court of Appeals for the Second Circuit affirmed, without opinion, a decision of the District Court for the Southern District of New York. The opinion of the District Court is not reported, but is found in Vol. 5, American Federal Tax Reports, page 5888, and is as follows:

> No one can now say whether any portion of the estate of Solomon Kahn will ever vest in a charitable or other institution within the provisions of subdivision 3 of section 403(a) of the Revenue Act of 1918. To hold that such portion of the estate may, under certain conditions and contingencies, vest in such institutions would be a perversion of the intent and purpose of Congress in providing for the exemption now claimed. It would also furnish a means whereby estates might easily be put beyond the reach of the inheritance tax law. To my mind, Congress intended that the exemption should not apply in cases where there is no certainty of a charitable bequest or desire ever taking effect. The motion to dismiss the complaint is granted.

In that case a trust was created, the income of the trust estate to be applied to the maintenance and support of a designated beneficiary for life, with a provision authorizing the trustees to use so much of the principal as they saw fit to the support and maintenance of the beneficiary. The will contained a provision that the residue should go

to charity. The court held that because the trustees might use the entire estate for the life tenant it was not clear that the charity would ever receive anything, and refused the deduction.

In the case of *Herron* v. *Heiner* (24 F. (2d) 745) the United States District Court for the Western District of Pennsylvania, dealt with a will creating a trust which provided that part of the income should be applied by the trustees in such amounts as they might deem proper to the maintenance and support of two persons who were then incurably insane, and the rest of the income to be applied to charity. The Commissioner of Internal Revenue had held that because of the wide discretion of the trustees as to the expenditure of income for the insane beneficiaries it could not be determined what the charities would receive, and the value was not ascertainable, but the court found what was reasonably necessary to maintain the insane persons and that the remainder would go to charity, and valued it and allowed the deduction.

In *First National Bank of Birmingham* v. *Snead* (24 F. (2d) 186) the Circuit Court of Appeals for the Fifth Circuit dealt with a will creating a trust the income of which was to be paid to the testator's widow, with authority to the trustees to make payments to her out of the principal to the extent they might deem it necessary for the proper support and comfort of the widow. The residue was given to charity. It was claimed there by the

Collector of Internal Revenue that the value of the bequest to charity could not be ascertained, and whether it would receive anything depended upon the contingency that the principal was not expended for the widow, but the court held that the trustees would be presumed to act reasonably and not arbitrarily, and that the amount which could properly be applied for the widow's use, depending upon her station and habits of life, could be estimated and the value of the bequest to charity thus determined and deducted.

The present case may perhaps be distinguished from *Herron* v. *Heiner* and *First National Bank of Birmingham* v. *Snead* on the ground that in the present case the discretion with respect to the use of the principal was vested in the beneficiary herself and not in trustees.

III

THE DEATH OF THE LIFE TENANT BEFORE ASSESSMENT OR PAYMENT OF THE TAX PERMITS VALUATION OF THE CONTINGENT REMAINDERS TO CHARITIES AND MAY ALLOW THEIR DEDUCTION

It will be noted that the testator died on June 15, 1921; his widow, the life tenant, died on December 12, 1921; and on June 14, 1922, the executor of the testator made an estate tax return and paid the tax shown to be due.

In *Boston Safe Deposit & Trust Co.* v. *Nichols* (18 F. (2d) 660) and *Union Trust Co.* v. *Heiner*

(19 F. (2d) 362) it has been held that where a life tenant dies prior to the assessment and payment of the tax the value of remainders should be determined upon the basis of the actual value of the life estate, not its theoretical value at the date of the testator's death calculated by the use of mortality tables. See also *Herold* v. *Kahn* (159 Fed. 608, decided under the War Revenue Act of 1898. This rule seems to be logical. When the time arrives for assessment and payment of the tax the best information then available should be used. There may be some question whether additional facts occurring after payment but before final audit may be resorted to, but no such question is here involved, for in this case the life tenant died before a return was due or filed, and before the tax was due or paid.

It would seem, therefore, that in this case the value of the bequests to charities was properly established by the death of the life tenant if not at the time of the decedent's death. The view of the Treasury Department discussed under Point I of this brief, however, does not depend upon the difficulty of proving the value of contingent bequests to charities, because it refuses to permit such value to be deducted even when proven by reference to mortality tables, which in other instances are regarded as adequate proof of value. The view of the Treasury Department must rest, therefore, upon the theory that a contingent bequest to a

charity is intrinsically not the kind of a bequest which Congress intended to be deductible. It would seem that the subsequent death of a life tenant can not change the intrinsic nature of a contingent bequest, and that we are therefore faced with the question whether the view of the Treasury Department is sound as applied to *all* contingent bequests.

However, it seems only fair to add that it may be that Article 56 of Regulations 37 does not go so far. The language of the Article is that (Italics ours):

> Where the bequest, legacy, devise, or gift is dependent upon the performance of some act, or the happening of some event, in order to become effective it is necessary that the performance of the act or the occurrence of the event shall have taken place *before the deduction can be allowed.*

If the italicized words refer to time, the death of a life tenant before a deduction is claimed is sufficient to permit the deduction. But it is more probable that the words are intended to mean "in order that the deduction can be allowed" and that the Treasury Department intended the date of death of the decedent to be the basic date for determining whether a bequest is contingent. At any rate, the Court of Claims seems to have taken this view.

CONCLUSION

The questions presented seem to be of some importance and likely to arise in other cases. Subse-

quent Revenue Acts contain provisions similar to those of Section 403 of the Revenue Act of 1918. Under these circumstances we do not feel justified in opposing a writ of certiorari.

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SEPTEMBER, 1928.

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 267

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v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 22) is reported in 64 C. Cls. 686.

JURISDICTION

The judgment of the Court of Claims was entered February 20, 1928. (R. 25.) Motion for new trial was duly made April 18, 1928, and denied May 28, 1928. (R. 26.) Petition for certiorari was filed July 13, 1928. The jurisdiction of this Court rests on Section 3(b) of the Act of February 13, 1925.

THE QUESTIONS PRESENTED

The testator's residuary estate was given by his will to his wife for life, with a provision that she might have such additional sum from the principal as "may be necessary to suitably maintain her in as much comfort as she now enjoys." The remainder after the expiration of the life estate was given to certain charities. The testator died June 15, 1921, and his widow died December 12, 1921, before the estate tax was required to be determined and assessed.

The questions presented are:

First, whether the provision allowing the use of the principal to maintain the widow made the amount of the bequests to charity so uncertain and unascertainable as to prevent the deduction of the amount of the charitable bequests from the gross estate in determining the estate tax, and second, whether the value of the bequest of the remainder to charity was to be ascertained by use of tables of mortality, in the light of the conditions at the date of the testator's death, or to be determined by considering the fact of the death of the widow.

THE STATUTE AND REGULATIONS

The portions of Section 403 of the Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1098) which are applicable are as follows:

> That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

* * * * *

(3) The amount of all bequests, legacies, devises, or gifts, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes. This deduction shall be made in case of the estates of all decedents who have died since December 31, 1917; * * *.

Articles 53 and 56, Regulations 37, approved August 8, 1919, relating to estate taxes under the Revenue Act of 1918, were as follows:

ART. 53. *Public, charitable, and similar bequests.*—Bequests to religious, charitable, scientific, literary, or educational corporations are deductible only if the corporation is organized or operated exclusively for one of the purposes specified (see Art. 54). Similarly, in the case of a trust, the trust must be exclusively for such purposes. It does not prevent deduction, however, that the property placed in trust is also subject to

another trust for a private purpose. Thus, where money or property is placed in trust to pay the income to an individual during life, and then to pay or deliver the same to a charitable corporation, or apply the principal to a charitable purpose, the charitable bequest or devise forms the basis for a deduction. The amount of the deduction, in such case, is the value, at the date of the decedent's death, of the remainder interest in the money or property which is devised or bequeathed to charity. For the manner of determining the value of such remainder interest, see Article 20. Gifts made in the decedent's lifetime are deductible only if made in contemplation of death, or intended to take effect at or after death, and the property is consequently included in the gross estate. Gifts made in satisfaction of a legacy are also deductible. The deduction is not limited in the case of the estates of residents to bequests to domestic corporations or to trustees for use within the United States.

ART. 56. *Conditional bequests.*—Where the bequest, legacy, devise, or gift is dependent upon the performance of some act, or the happening of some event, in order to become effective it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed. Where, by the terms of the bequest, devise or gift, it is subject to be defeated by a subsequent act or event, no deduction will be allowed.

Article 20, Regulations 37, above referred to, provides for the valuation of annuities, life and remainder interests, according to mortality tables set up in the regulation.

Article 56 above quoted was subsequently amended by Article 50 of Regulations 63 under the Revenue Act of 1921 (24 Treas. Dec., Int. Rev., p. 1036, No. 3384) to read as follows:

> ART. 50. *Conditional bequests.*—Where the transfer is dependent upon the performance of some act or the happening of some event in order to become effective, it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed.
>
> Where the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

The latter article was readopted as Article 47 of Regulations 68 under the Revenue Act of 1924 (27 Treas. Dec., Int. Rev., p. 81, No. 3683), and it was again readopted as Article 47 of Regulations 70 under the Revenue Act of 1926 (28 Treas. Dec., Int. Rev., p. 427, No. 3918).

STATEMENT

This action was brought in the Court of Claims to recover the amount of an estate tax alleged to have been erroneously and illegally assessed and collected. (R. 5.) The findings of fact (R. 19) disclose that on June 15, 1921, one Edwin C. Stewart, a resident of the State of New York, died testate (R. 19). His will is set forth at length in the record. (R. 14.) The 12th, 13th, and last provision of the will are as follows:

> Twelfth. I give unto my beloved wife, Annie L. Stewart, of Ithaca, New York, the use for her natural life of all the rest, residue and remainder of my property, real, personal and mixed of which I may die seized, with full authority to sell and dispose of any real estate of which I may die seized, for such figures as she may, in her judgment, deem for the best interest of my estate. I also authorize my wife, Annie L. Stewart, to use any additional sum from the principal of my estate that may be necessary to suitably maintain her in as much comfort as she now enjoys. I request my wife, Annie L. Stewart, from the said income of my estate, to give annually a sum sufficient in her judgment for the maintenance of my cousin, Grace L. Ely, of West Allenhurst, New Jersey.
>
> Thirteenth. At the death of my wife, Annie L. Stewart, of Ithaca, New York, from the balance of my estate, I direct my Executors, hereinafter named, to pay unto

the trustees of East Lawn Cemetery, the sum of Ten Thousand Dollars ($10,000).

* * * * *

Lastly, I hereby appoint my wife, Annie L. Stewart of Ithaca, New York, and the Ithaca Trust Company of Ithaca, New York, Executors of this my last Will and Testament; and hereby appoint the Ithaca Trust Company, of Ithaca, New York, to be Trustee of each and every Trust created in this Will for which a Trustee is not hereinbefore named.

The will was duly admitted to probate and letters testamentary issued to the widow and to this petitioner.

The widow was born May 27, 1860 (R. 20), and she died December 12, 1921, before the estate tax was required to be or was computed, ascertained or determined. The Court of Claims found (R. 21):

For many years prior to the death of said Edwin C. Stewart, he and his widow, Annie L. Stewart, lived in Ithaca, New York, in a simple and unpretentious style, spending each year less than the income produced by the estate of the said testator; and the income from the estate of said testator was, at his death, and during the life of the widow, in excess of the sum necessary to maintain her suitably in as much comfort as she enjoyed at any time during the lifetime of said testator. After the payment of debts and the specific legacies, the estate produced an income in excess of the sum necessary, in

> the absence of unusual circumstances, to maintain her suitably in as much comfort as she enjoyed at any time during the lifetime of the said testator.

It found that the value of the residuary estate at the date of the testator's death was $347,244.51, and that the value of the widow's life estate at the date of the death of her husband, computed according to the mortality tables prescribed by the Treasury regulations, was $126,329.64.

The petitioner's claim was based on the theory that the value of the widow's life estate was to be determined as of the date of the testator's death by the use of mortality tables, and not determined in the light of her death in December, before the tax was required to be computed. (R. 12.)

The Court of Claims denied recovery on the ground that, because of the provision allowing the widow to use the principal, the amount of the ultimate bequest to charity was too uncertain to enable its value to be ascertained and deducted from the gross estate.

SUMMARY OF ARGUMENT

I. This cause is brought here for settlement of the law because of conflict of decisions and because regulations of the Treasury Department are involved.

The first matter for consideration is the proper construction of the will. The will, properly construed, placed the residuary estate in the hands of the executrix and the executor, in trust during the

widow's life. Such discretion as existed in determining the necessity for drawing on the principal was given not alone to the widow, but to the executor acting with her. The widow did not have the unrestrained use of the principal but was limited to such use as was necessary to maintain her in her accustomed standard of living. Beyond that she could not go, and these restraints were enforceable in the courts. The findings of fact as to the widow's standard of living and as to the amount of the income took the amount of the residuary bequest out of the field of mere speculation and afforded a reasonable basis for determining its value and amount. On this point our views differ with the Court of Claims and with those of the Bureau of Internal Revenue, as disclosed by its regulations, and accord with those of the United States Circuit Court of Appeals in *First National Bank of Birmingham* v. *Snead*, 24 F. (2d) 186.

II. On the question whether the facts known at the date of the testator's death form the sole basis for computing the value of the life estate, or whether the value of the widow's life estate may be computed in the light of her death, occurring shortly after the testator's death and before the computation of the estate tax, the decisions are not in accord. The petitioner, in its claim for refund and in its petition in the Court of Claims, proceeded on the theory that the value of the widow's life estate was to be determined by mortality tables and not in the light of her early death;

but if, on the facts disclosed, the petitioner is entitled to greater relief than that asked for, there is no reason why the United States should oppose it.

ARGUMENT

I

THE USE OF THE PRINCIPAL TO MAINTAIN THE WIDOW WAS DEFINITELY LIMITED BY THE WILL. WHETHER THE KNOWN FACTS FORMED A SUFFICIENTLY DEFINITE BASIS FOR THE ASCERTAINMENT OF THE AMOUNT OF THE BEQUESTS TO CHARITY IS SUBMITTED FOR THE DECISION OF THIS COURT

At the outset it is necessary to construe the will. If the widow was given an unrestrained right to use the principal in her discretion, the amount of the bequests to charity would be entirely speculative. On the other hand, if the will restrains the widow's use of the principal by any definite formula, so that the formula applied to the disclosed facts affords a reasonable basis for defining the value of the amount of the charitable bequests, a different question arises.

The will is somewhat crudely drawn. The provision giving the widow the power to sell the real estate does not affect the case, as under that she was required to use a reasonable discretion in exacting an adequate price, and the proceeds became substituted for the original property as part of the estate. While somewhat indefinite, no doubt the will means that the residue of the estate was to remain in the

hands of the executrix and executor during the widow's life. The provision in Paragraph Thirteenth that after the widow's death the executor should pay money to trustees shows this to be so. (See *Smith* v. *Field*, 98 N. J. Equity, 532.) Even if the will had contemplated that the entire possession and control of the personal property should be left with the widow during her life, only a life estate would have been created and not an absolute power of disposition. *Peck* v. *Smith*, 227 N. Y. 228; *In re Ithaca Trust Co.*, 220 N. Y. 437. Paragraph Twelfth of the will did not allow the widow to use such part of the principal as *she* might deem necessary. It allowed the use of such amounts as " may be necessary." With the property in the joint control of herself and her coexecutor, her use was clearly restrained. Whatever limit of judgment and discretion was allowed, was vested not in the widow alone, but in the executrix and executor, acting together. No large discretion was allowed. The use of only such amounts as might be "necessary to suitably maintain her in as much comfort as she now enjoys" was permitted. That provision imposed a definite restraint on the use of the principal. Even where words indicating a vesting of discretion as to the facts have been used by a testator, the restraint is definite and enforceable by the remainderman in the courts. *Smith* v. *Field, supra; Stocker* v. *Foster*, 178 Mass. 591; *Prewett* v. *Land*, 36 Miss. 495; *In re Estate of Jared Stevens*, 20 N. Y. Misc. Repts. 157.

With the will thus construed, the question arises whether there was any definite basis for a finding as to the probable value of the bequests to charity, in the light of facts known at the date of the testator's death.

Article 56 of Regulations 37, in force at the time this case arose, provides that "where, by the terms of the bequest, devise or gift, it is subject to be defeated by a subsequent act or event, no deduction will be allowed." Literally construed and applied to its limit, the regulation forbade the deduction in this case because there was the possibility that a substantial part, if not all, of the principal might be absorbed in maintaining the widow. The Court of Claims has so held, and the arguments in support of its view are fully set forth in its opinion. We are compelled to admit that we are not in accord with the views expressed in its decision or the construction placed upon the regulation by the Bureau of Internal Revenue.

The findings show that the widow was 61 years of age when her husband died. She and her husband had for a long time found the income of this estate more than sufficient for their joint support. Her style of living had become fixed, and at her age was not likely to become changed. In any event, she was limited by the will to the degree of comfort and standard of living to which she had been accustomed. Only shrinkage in value of the investments and diminution of earned income from

such causes would have made it necessary to use any portion of the principal.

If there had been no authority for use of the principal, according to established practice of the Treasury Department and its regulations, mortality tables could have been used as the method of ascertaining the value of the life estate and remainder. It is obvious that the mortality tables are based on the experience of a large number of lives and represent the average, and do not establish, in an individual case, the expectancy of a single person. As a practical matter, there are more uncertainties as to the real value of a bequest to charity in an individual case when determined by mortality tables than there was in this case as to the extent to which the power to use the principal might operate to diminish the charitable bequest. This point of view is supported by the decisions in *Herron* v. *Heiner* (United States District Court for the Western District of Pennsylvania), 24 F. (2d) 745, and *First National Bank of Birmingham* v. *Snead* (Circuit Court of Appeals for the Fifth Circuit), 24 F. (2d) 186. On the other hand, in *Kahn et al., Exr's.*, v. *Bowers, Collector*, 9 F. (2d) 1018, the Circuit Court of Appeals for the Second Circuit affirmed, without opinion, a decision of the District Court for the Southern District of New York. That was a case where the income of a trust estate was to be applied to the maintenance of a designated beneficiary for life, with a provision authorizing the trustees to use

so much of the principal as they saw fit for the benefit of the beneficiary. The will contained a provision that the residue should go to charity. The District Court held that it was not clear that the charity would ever receive anything and refused the deduction. This opinion is not reported but is contained in Vol. 5, American Federal Tax Reports, page 5888, as follows:

> No one can now say whether any portion of the estate of Solomon Kahn will ever vest in a charitable or other institution within the provisions of subdivision 3 of section 403(a) of the Revenue Act of 1918. To hold that such portion of the estate as may, under certain conditions and contingencies, vest in such institutions would be a perversion of the intent and purpose of Congress in providing for the exemption now claimed. It would also furnish a means whereby estates might easily be put beyond the reach of the inheritance tax law. To my mind, Congress intended that the exemption should not apply in cases where there is no certainty of a charitable bequest or devise ever taking effect. The motion to dismiss the complaint is granted.

That case may be distinguished from this because of the wide discretion given the trustee.

See also *Dugan, Executor of O'Neill,* v. *Miles,* 292 Fed. 131.

The case of ***Humes*** v. ***United States,*** 276 U. S. 487, bears only indirectly on this case, in that the contingencies were such that there was no basis,

through the use of mortality tables or any other reasonable method, for ascertaining the value of the bequest to charity.

Of course, possibility of losses to the trust estate, through misfortune or bad investments, exists in the case of any trust with a life estate and remainder, and the presence of such elements of uncertainty in this case does not distinguish it from the ordinary case of life estate and remainder, the value of which is determined by the use of mortality tables.

The regulations on this subject have been in effect for some years, and no doubt have been applied to a considerable number of cases; and the fact that Congress has reenacted the statute with the regulations in force is a consideration which must be borne in mind before the position of the Bureau of Internal Revenue is rejected.

The appendix contains all the recorded rulings of the Bureau.

II

THERE IS A DIFFERENCE OF OPINION AS TO WHETHER THE VALUE OF THE GIFT TO CHARITY IS TO BE DETERMINED BY FACTS KNOWN AT THE TESTATOR'S DEATH OR IN THE LIGHT OF EVENTS HAPPENING BEFORE THE CALCULATION OF THE TAX

In this case the testator died in June, 1921, and the widow in December of that year. The tax was not required to be ascertained or calculated or returned until 1922. Laying aside the element of the case discussed in subdivision I of this brief, the

question arises whether the value of the widow's life estate should be computed with eyes shut to the fact of her early death and by the use of mortality tables as of the date of the testator's death.

The petitioner proceeded on the theory that this method is the right one and mortality tables are to be used (R. 12), and the only relief sought in the Court of Claims was on that basis. However, the facts in the record raise the point, and we know of no proper ground to object to the consideration of the question or the granting of such relief to the petitioner as the record discloses it is entitled to.

The rights of the parties in regard to the payment of a tax of this kind are ordinarily to be determined as of the time of the decedent's death.

Howe v. *Howe*, 179 Mass. 546.
McCurdy v. *McCurdy*, 197 Mass. 248.
Hooper v. *Bradford*, 178 Mass. 95.
In re White's Estate, 208 N. Y. 64.

For Federal estate tax purposes the value of the gross estate of the decedent should be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated. (Section 402.) The value of life estates in cases like this can not be readjusted from time to time in the light of subsequent events. There is clearly no basis for readjustment after the time fixed by law for the calculation, return and assessment of the tax, for if such a practice were to be followed these cases would never be closed. The contention of the petitioner is that if events happen between the date of

the testator's death and the date fixed for the ascertainment and computation of the tax which throw additional light on the values to be determined, such events may be taken into account. The value of the property involved must, of course, be determined as of the date of the testator's death. The value of the life estate or remainder interest as of the date of the testator's death was not changed by subsequent events. To support the petitioner's position, the following cases are cited:

Boston Safe Deposit Co. v. *Nichols*, 18 F. (2d) 660.
Union Trust Co. v. *Heiner*, 19 F. (2d) 362.
Herold v. *Kahn*, 159 Fed. 608.

No appeal was taken by the Department of Justice from the decision in the *Boston Safe Deposit Co. case*.

To the contrary see—

Howe v. *Howe*, 179 Mass. 546.
In re White's Estate, 208 N. Y. 64.
United States v. *Farr's Executor*, 196 Fed. 996 (District Court, Eastern District of Pennsylvania).

The cases last cited seem to support the conclusion that the value of the life estate is to be determined by the use of mortality tables in the light of facts known at the date of the testator's death, and not in the light of subsequent events occurring before the calculation of the tax. It is true that in both Massachusetts and New York the taxing stat-

utes expressly authorize the use of mortality tables, but so do the estate tax regulations of the Treasury Department. (See Regulations 37, Article 20, 23 T. D., Internal Revenue, No. 3145, p. 280; Regulations 63, Article 15, 24 T. D., Internal Revenue, No. 3384, p. 1036; Regulations 68, Article 13, 27 T. D., Internal Revenue, No. 3683, p. 81; Regulations 70, Article 13, 2 T. D., Internal Revenue, No. 3918, p. 427.)

See—

Simpson v. *United States*, 252 U. S. 547.
Cochran v. *United States*, 254 U. S. 387.
Henry v. *United States*, 251 U. S. 393.
United States v. *Fidelity Trust Co.*, 222 U. S. 158.

In Gleason & Otis, Inheritance Taxation (1925), it is said, at page 505:

> Though it might seem an injustice to tax the theoretical value of a life estate of a woman of thirty, whose expectation of life is thirty-five years and whose interest in the fund is about three-fourths its entire amount at full value when she actually survives the testator only a few hours, *the logic that a time must be fixed for valuation and that time is the death of the testator is immutable and has thus far been uniformly sustained.* (Italics ours.)

In *Boston Safe Deposit Co.* v. *Nichols*, 18 F. (2d) 660, it was pointed out that the question in a case like this is as to the amount of the *net* estate and as to the amount of the deductions to be made

from the gross estate, and that many of the deductible items are not ascertainable until after the testator's death and in the light of occurrences during administration, and for that reason it justifies the use of information developed subsequent to the testator's death in the calculation of the deductible value of remainders to charity.

In this brief and the petitioner's, and the decision below and those cited, there is presented all the available material on these two problems.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

FEBRUARY, 1929.

APPENDIX

Solicitor's Memorandum No. 1135

ESTATE TAX—TITLE IV, REVENUE ACT OF 1918

Charitable gift dependent upon contingency.—Where a gift to charity is dependent upon a contingency which makes it impossible to determine the value of the gift at the time of the death, no deduction can be made from the value of the gross estate. (Revenue Act of 1918, Sec. 403(a)(3).) Deduction refused where the gift to charity was subject to a trust, to last during the life of the survivor of two daughters and three grandchildren, and twenty-one years longer, and during the trust period the trustee was directed to apply the income to the use of specified individuals, and also empowered, at discretion, to apply the principal to the same purpose.

August 22, 1919.

Deputy Commissioner Hagerman:

Opinion is requested as to whether a gift made to "The Cleveland Foundation" is deductible in ascertaining the value of the net estate of Charles W. Wason.

The decedent died, a resident of Ohio, on April 15, 1918. On October 7, 1914, the decedent executed a trust of certain property to The Cleveland Trust Company. The disposition was as follows:

The income, and such parts of the principal as the trustee might decide, were to be paid to the decedent

during his life. After his death certain specified payments were to be made to two daughters. In a certain contingency $50,000 was to be paid to Cornell University. Provision was made for certain annuities. The wife was next empowered to dispose of one-third of the property by will. The income from the remainder of the estate was given to the decedent's daughters during their life, any afterborn child taking a similar share. It was then provided:

> I also authorize and empower the Trustee to expend such part or all of the principal of the trust estate as in the judgment of the Trustee and according to its absolute discretion may be necessary to provide for the comfort, enjoyment, maintenance and support of my wife and of my children in case the income provided for them is insufficient therefor.

Upon the death of any child leaving issue, the income of the child's share was to be paid to such issue; and in case of the death of a child without issue, the income of his or her share was to go to the surviving children or their issue. The trust for the children and their issue was to continue for a period of twenty-one years after the death of the last survivor of his two daughters and three grandchildren. At the expiration of this period, or the extinction of all issue prior thereto, the trust property was to be devoted to the purposes of a certain charitable trust, known as "The Cleveland Foundation." By his will the decedent placed certain additional property in this trust.

The statute provides for the deduction of—

> The amount of all bequests, legacies, devises, or gifts, * * * to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes. (Revenue Act of 1918, Sec. 403 (a) (3).)

The deduction provided for is the "amount" of a bequest to charity; and this, in case of a remainder interest, means the *value* of such interest at the time of the death. (Law Opinion No. 874, July 9, 1919.) In the present case the prior estates are of such a character as to render it very difficult to determine the value of the remainder. In addition, an absolute discretion is vested in the trustee to apply the principal, as well as the income, to the use of private individuals. It is impossible to tell how this discretion will be exercised; and without knowledge on that point it is equally impossible to value the interest, if any, which goes to charity. Under these circumstances, no foundation is laid for a deduction.

The Regulations (No. 37 (Revised, 1919), Art. 38) provide:

> No deduction may be taken upon the basis of a vague or uncertain estimate. Where an uncertain or contingent liability, not allowed

as a deduction, becomes fixed, and payment is made, the remedy is a claim for a refund of the excess tax.

The principles stated apply to the present deduction. It may not now be allowed; but if the uncertainty as to the value of the charitable bequest is later removed an application for a refund would be proper.

It is held, therefore, that the bequest to The Cleveland Foundation made by the decedent is not now a subject for deduction in estimating the value of the net estate; but that an application for a refund may be made if the uncertainty as to the amount of the bequest is removed.

(Signed) ROBERT N. MILLER,
RDT: ACL. *Solicitor of Internal Revenue.*

SOL: C: JGK
188657

AUGUST 14, 1922.

In re *Arthur L. Howard, Executor of the Will of Zabdiel Adams Willard, Plaintiff*, v. *John F. Malley, Sometime Collector of Internal Revenue, Defendant; Arthur L. Howard, Executor of the Will of Zabdiel Adams Willard, Plaintiff*, v. *United States of America, Defendant.*

MR. SOLICITOR: The foregoing cases were argued on defendant's demurrers (general and special) to the complaint and petition before Hon. Julian Mack, District Judge, at Boston, Mass., August 11, 1922. At the close of the argument judgment was entered, without oral or written opinion, sustaining the demurrers.

The facts are briefly as follows:

The plaintiff's testator died March 15, 1918. Plaintiff qualified as executor April 17, 1918. The estate was administered promptly and the estate tax was paid by the executor in October, 1918, under the provisions of the Revenue Act of 1916 as amended. Decedent by his Will created a trust providing for the payment of the income of his estate to his sister, daughter and nurse, and after the death of the survivor of the life tenants the trust to continue for twenty-one years, during which period one half of the income was to be paid to five charitable corporations and the other half to be accumulated for the benefit of said five charitable

corporations. At the end of the trust period the entire corpus of the estate, with accumulations, was to be distributed pro rata among the five charitable corporations. Plaintiff's testator, however, inserted a provision in his will authorizing, empowering and directing the trustee or trustees thereunder for the time being to invade the principal for the purpose of providing for the comfort and welfare of the life tenants if at any time any exigency or emergency should arise which in the discretion of the trustee or trustees for the time being would necessitate or justify such invasion of the principal.

Under the 1916 Act as amended there was no exemption from taxation of bequests to charity. The Revenue Act of 1918, however, contained such an exemption and Section 403 (a) (3), establishing such exemption, provided that "this deduction shall be made in case of the estate of all decedents who have died since December 31, 1917."

After the enactment of the Revenue Act of 1918 plaintiff filed a claim for the refunding of the amount of the tax based upon the value of the gift to the five charities, which refund was denied, and plaintiff brought an action in assumpsit against Collector Malley and a suit against the United States under the Tucker Act to recover back the amount so paid.

To the foregoing actions the defendants filed special and general demurrers, assigning six grounds for demurrer. The only two grounds necessary to refer to here and the only grounds considered by the court go to the merits of the case and the action of the court in sustaining the demurrers settles the whole matter. The grounds of the general demur-

rers were that the complaint and petition stated no legal cause of action because:

1st. A gift to a trustee for the use of a charitable corporation, subject to be defeated by the exercise of a power and discretion vested in the trustee, is not exempt from taxation under section 403 (a) (3).

2d. A gift to a trustee for the use of a charitable corporation, but not exclusively for such use, is not exempt from taxation under Section 403 (a) (3) of the Revenue Act of 1918.

Judge Mack, correctly concluding that a decision of the questions of law raised by the foregoing grounds assigned in the general demurrers would dispose of the whole matter, declined to consider the other questions raised, but expressed himself as firmly of the opinion that the Bureau had correctly construed the law, that the plaintiff was not entitled to recover back the taxes paid, and that the demurrers would be sustained.

These cases are of importance. They are cases of first impression and it is understood that there are several similar cases pending in the Bureau which have not yet reached the stage of litigation. The judgment of the court in sustaining the demurrers approves the construction of the statute contained in Article 56 of Regulations 37 as amended November 21, 1921, by T. D. 3241.

J. G. KORNER,
Acting Assistant Solicitor,
Civil Division.

S. M.—2946

SOL: I: II: JFG
A-203896

OFFICE OF THE SOLICITOR OF
INTERNAL REVENUE,
Dec. 30, 1924.

In re: Estate of James C. Patterson, District of Alabama. Date of death, January 19, 1923.

Mr. COMMISSIONER: This office has considered the protest of the executor of the above-named estate in so far as it is directed against the action of the Miscellaneous Tax Unit in proposing in its 30-day letter dated September 13, 1924, to disallow the deduction on account of charitable bequests.

The representative of this estate appeared before this office and presented oral arguments in favor of the estate's contention that the deduction should be allowed.

The facts under consideration are as follows: Decedent by his last will created a trust fund, under the terms of which the income of which was to be paid to his widow during her life, and by a further provision, arrangement was made whereby under certain circumstances the trustees were empowered to pay over to the widow such additional sums of the principal of the trust estate as to the trustees might seem necessary or desirable for such purposes. At the death of the widow the trust fund was to be divided among several charitable

institutions. The exact point involved here is covered by Article 50, Regulations 63, the second paragraph of which provides:

> Where the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

In the present case no part of the trust fund is exempt from the exercise of the power given the trustees to divert the principal. It follows, therefore, that the estate is not entitled to any deduction on account of the bequests to charitable organizations. It is the opinion of this office, therefore, that the action of the Unit is correct and should be sustained. Accordingly, it is recommended that the proposed 60-day letter hereto attached be approved.

(Signed) NELSON T. HARTSON,
Solicitor of Internal Revenue.

S. M.—3183

SOL: I: II: JFG
A–204639

OFFICE OF SOLICITOR,
INTERNAL REVENUE,
Feb. 13, 1925.

Estate of Peter Klein, District of 10th Ohio. Date of death, August 13, 1922.

Mr. COMMISSIONER. This office has considered the protest filed by the representative of the above-named estate against the disallowance of the deduction claimed on account of charitable, public and similar bequests. No hearing was requested before this office within the time provided therefor.

The facts are as follows: The decedent provided by will that his wife should receive the entire income from his estate during her life. Upon her death, the executors were directed to pay all debts and funeral expenses of the widow before provision was made for the payment of residuary legacies, a part of which were the legacies to charitable organizations.

Since it is impossible to ascertain, until the death of the wife, the amount of her debts and the funeral expenses, it is seen that the amount claimed as a deduction is subject to be diverted to a noncharitable purpose, and in view of the express provisions of Regulations 63, since the amount of the deduction can not be presently ascertained, no deduction can be allowed.

It is the opinion of this office, therefore, that the action of the Unit is correct, and it is accordingly recommended that the 60-day letter hereto attached be approved.

(Signed) NELSON T. HARTSON,
Solicitor of Internal Revenue.

Enclosure 11020.

S. M.—4359

SOL: I: II: JFG
A-205171

SEPTEMBER 17, 1925.

Deputy Commissioner ESTES:

Reference is made to your memorandum dated January 9, 1925 (MT–ET–1035–LSP), in connection with the estate tax on the estate of Frank A. Ruf, District of 1st Missouri. A hearing was held in this office at which the estate was represented by its attorneys.

The decedent, Frank A. Ruf, died May 28, 1923, a resident of Missouri. In his will decedent made provision for certain bequests and then provided that all the rest, residue and remainder of the estate should go to a trustee named, and after making provisions giving the trustee power to manage and control the trust estate, the decedent made the following provision in his will:

> I direct my Trustee, beginning on the fifteenth day of the second month following my death, to pay over unto my wife, Alpha H. Ruf, all of the net income and revenue derived from said trust estate, or, if need be, such part of the corpus thereof as may be necessary for the comfort, maintenance and support of my wife, during her life. A request, in writing, to my Trustee, made by my wife, stating that the sum requested by

> her is needed for her comfort, maintenance and support, shall be authority to my Trustee to pay unto her any sum so requested, out of the corpus; or, in the event of her incapacity, then my Trustee may, in its discretion, use so much of the corpus as may be necessary for her comfort, maintenance and support.

Provision is then made on the death of the wife for the payment over of the entire residue to certain charitable organizations.

It is the contention of the estate that since the income of the estate has been sufficient for the comfort, maintenance and support of the widow, and that since in all probability the entire income of the estate will not be used by her for that purpose, that the estate should be entitled to deduction on account of charitable bequests in the amount of the remainder value of the entire residue of the trust fund after the death of the widow.

Article 47, Regulations 68, provides:

> Where the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

In the present case no part of the trust fund is exempt from the exercise of the power given to divert the principal. It follows, therefore, that under the regulations as quoted above and in view

of the decision of the District Court in the case of Howard vs. Malley concerning a similar deduction claimed in connection with the estate tax on the Willard estate, it is the opinion of this office that the estate is not entitled to any deduction on account of the bequest of the residue to charitable corporations. It is accordingly recommended that the 60-day letter be prepared by your office in accordance with this opinion.

In view of the fact that the only point upon which it appears your office and the representative of the estate had not agreed has been passed on by this office, and since the attorney for the estate has appeared before this office at a hearing in connection with that point, it will not be necessary to notify the representatives of the estate of the transmission of the files to this office.

The 60-day letter, when prepared, should be forwarded through this office for approval.

(Signed) A. W. GREGG,
Solicitor of Internal Revenue.

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